IN THE SUPREME COURT OF THE UNITED STATES

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JOHN J. FELLERS, :

Petitioner :

v. : No. 02-6320

UNITED STATES :

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Washington, D.C.

Wednesday, December 10, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:09 a.m.

APPEARANCES

SETH P. WAXMAN, ESQ., Washington, D.C.; on behalf of the Petitioner.

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(10:09 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 02-6320, John J. Fellers v. the United States.

Mr. Waxman.

ORAL ARGUMENT OF SETH P. WAXMAN

ON BEHALF OF THE PETITIONER

MR. WAXMAN: Mr. Chief Justice, and may it please the Court:

Unlike the two cases in which you heard argument yesterday, and unlike Oregon v. Elstad, the original inculpatory statement in this case was elicited not merely in violation of a prophylactic rule, but of the Constitution itself, specifically the Sixth Amendment right of an accused to the assistance of counsel throughout his criminal prosecution, a right designed to protect equality in the adversarial process by a --

QUESTION: What is your authority, Mr. Waxman, for saying that this is different from the Miranda warnings in the sense that it's -- it's an immediate violation rather than something -- something like Miranda?

MR. WAXMAN: Well, it's -- Your Honor, I

guess I have a two-fold answer. First of all, the -- the constitutional right involved is the Sixth Amendment right, unlike in Miranda, the Fifth Amendment right of self-incrimination. And in -- in Oregon v. Elstad and Chavez v. Martinez, this Court recognized that although the Fifth Amendment self-incrimination right is not completed until the statement or its fruits are introduced at trial, the primary illegality, as this Court has used the phrase, is the coercion of the confession, and the Elstad rule doesn't apply where the primary illegality is constitutionally-proscribed conduct.

And here, this Court has not formally decided whether the Sixth Amendment is violated at the time the uncounseled, post-indictment statement is deliberately elicited, or only when the statement or fruits are admitted, that briefs of both sides rehearse for the Court somewhat conflicting statements in different opinions.

We rely on the cases cited in footnote 5 on page 8 of our reply brief, but for purposes of this case, Your Honor, it doesn't matter, because in Elstad, this Court made clear, and reiterated in Chavez, that although the Fifth Amendment violation is incomplete at the time a confession is coerced,

nonetheless the fruits of that confession have to be suppressed under the derivative evidence rule, unless the Government carries its burden to prove sufficient attenuation of taint. And therefore, even if the conduct deliberately eliciting from Mr. Fellers his inculpatory statement at a time when the officers knew he had been indicted, and the prosecution knew that he had a right to the advice of counsel, the fruits of that statement under Nix and Wade have to be suppressed. That's a rule that this Court has applied in Fourth Amendment, Fifth Amendment, and Sixth Amendment cases.

QUESTION: Do police officers generally know this distinction, that when an indictment has been handed down, suddenly the Sixth Amendment is in the case as well as the Fifth? There's an element of fiction to it in that the person doesn't have a lawyer yet. As a bright line rule, I guess, we need some point to know when proceedings have commenced, but I - I still think there's an element of fiction in it.

MR. WAXMAN: Well, Justice Kennedy, I don't -- I don't think I would call it fiction. I'm no more able to -- to testify than the member of this Court would be as to exactly what training the police

are told. But this Court has long established, long maintained that the Sixth Amendment cuts very bright lines. It is specific to the offense and it begins only when, but when, the state makes the unilateral determination to change its formal relationship with an individual from one in which the individual may or may not be under investigation, but the --

QUESTION: Mr. Waxman, you -- you're making a -- a very technical distinction, if I understand you correctly. If we focus on the suspect in the case of no indictment yet, who has been arrested, and the person who has been indicted and then arrested, and they're both alone with the same police officers in the same jail cell, and they're both subjected to the same interrogation. Why should the derivative evidence rule apply to the one or not the other? If we're talking about constitutional rights, it seems to me that these two individuals are similarly situated.

MR. WAXMAN: Well, they -- they aren't, Your Honor, and I don't think this is a matter of technicality or formality. It is a matter of formalism, but the two different amendments -- the Fifth Amendment privilege against self-incrimination, and the Sixth Amendment right to the assistance of

counsel throughout criminal prosecution, protect very different things. The first protects voluntariness, and the second protects the right of someone as to whom the Government has formally set its face and invoked a formal adversarial process.

QUESTION: The point is why -- why should that make a difference other than the convenience of the bright line? As in Justice Ginsburg's hypothetical, it could be the same drug ring, the same investigation, just the grand jury has -- hasn't got around to indicting the second defendant until the next day and then their rights are different.

MR. WAXMAN: Your -- Your Honor, it's -- it is entirely true that if the Court agrees with -- agrees with our submission here, that the Government can very easily conform its conduct simply by not conducting uncounseled interrogations or elicitations prior to changing its status. But the -- the -- we have to examine, this Court has exhorted counsel over and over again to be clear about what the underlying right is protected in determining what the appropriate remedy is.

And the right here is not coercion. The right here is not just addressed at police. It's addressed at the prosecution. And there is a

difference. You may call it technical, but it is in fact the hallmark of our adversary system that once the Government decides to invoke a formal adversary process, it proceeds on the supposition that each side deals with each other, A, at arm's length, and B, assisted by the advice of counsel, who will prevent each side, and in particularly the defendant, from, as this Court has explained in -- from conviction resulting from his own ignorance of his legal and constitutional rights, and that's what's being protected.

The unindicted individual, as to whom the Government may be conducting an investigation, doesn't have that formal right, but once the Government invokes our adversarial system, it invokes a set of protections that protect, not an individual's right to be protected from coercion or involuntariness -- that's protected no matter when the custodial -

QUESTION: Well, how -- how far does this right go, Mr. Waxman? Are you -- are you saying that police officers can't talk to someone who has been indicted?

MR. WAXMAN: Oh no, of course not. Your Honor has made clear for the - in his opinion for the

Court in Patterson v. Illinois -- I believe it was Your Honor -- in any event, the Court made clear in Patterson v. Illinois that the Sixth Amendment right to the assistance of counsel doesn't prevent the Government from eliciting statements from an indicted defendant. It requires that the accused either have counsel or make a waiver of the right to counsel, and the Court --

QUESTION: Well, but it's - it's - I'm - I'm talking about a situation where, say the police simply say something to a -- an indicted defendant. There's no violation of a right there, is there?

MR. WAXMAN: There only is a violation of a right, Your Honor, if what -- if the police statements and conduct amount to what this Court has deemed deliberate elicitation. That is, that what the Court has said in a half a dozen cases is that the Government may not do without counsel is deliberately elicit incriminating statements in the absence of his lawyer.

QUESTION: And you think that's what happened here?

MR. WAXMAN: I am -- I am absolutely certain that that's what happened here, and the --

QUESTION: That was the finding of the

magistrate and the --

MR. WAXMAN: Yes. The magistrate who heard that police officers, Justice O'Connor, found specifically that officers --

QUESTION: He found deliberate eliciting of the comments at the first statement?

MR. WAXMAN: Yes. He said it was, quote, designed to elicit a response -- I'm quoting from page 103 of the joint appendix --

QUESTION: Is that a factual finding or --

MR. WAXMAN: It is.

QUESTION: -- or a legal conclusion? I mean, it seems to me he can -- he can find as a fact what the officer said, but whether it constitutes deliberate elicitation within the meaning of our - of our opinion, it seems to me, is a legal question.

MR. WAXMAN: Well, it's - I think, Your Honor, Justice Scalia, it's -- this is a mixed question of law and fact under Miller v. Fenton and Thompson v. Keohane. But because --

QUESTION: And the Eighth -- the Eighth Circuit said, the Eighth Circuit is the closest court to this one, and I thought that the Eighth Circuit said, and that it's a threshold question in this case, that it wasn't anything like interrogation, and

that that's -- wasn't that the -- the --

MR. WAXMAN: The Eighth --

QUESTION: -- prime ground of the Eighth Circuit?

MR. WAXMAN: Justice Ginsburg, the Eighth Circuit -- two judges, the majority, the panel in the Eighth Circuit, concluded that it wasn't interrogation. The concurring judge --

QUESTION: But wouldn't we have to answer that --

MR. WAXMAN: -- pointed out, Judge Riley pointed out, that under the Sixth Amendment, unlike the Fifth, interrogation is not the standard. The standard is deliberate elicitation, or, as this Court has also phrased it, whether the prosecution, quote, intentionally creates a situation likely to induce the accused to make incriminating statements without the advise of counsel.

QUESTION: I thought the Eighth Circuit's position was that all this was was the police informing the defendant that he had been charged with this and this crime.

MR. WAXMAN: That is -- the -- the -- I don't believe the Eighth Circuit made any such finding, but the magistrate who heard the two

officers testify and evaluated their credibility made a determination, Justice Scalia, that is a mixed question of fact and law. The inquiry under the Sixth Amendment, deliberate elicitation or intentional creation of a situation, or purposeful conduct, which are the words this Court has used, involve a determination, among other things, about the credibility of what the officers said.

And when the magistrate concluded that they -- that their conduct was designed to elicit a response, and that it was not made for any purpose other than to get a response --

QUESTION: Well, was - was there any debate or controversy about what they in fact said?

MR. WAXMAN: There was no debate about what they said, but -- but there was a credibility finding made by the magistrate, because the --

QUESTION: If there was -- if there was no factual dispute, why - why did -- why was credibility involved?

MR. WAXMAN: Well, when you have -- when you -- because there is a subjective intent here, the subjective intent of whether Officer Bliemeister, he came to the house knowing that this man had been indicted, and said, we are here to discuss with you

your involvement with methamphetamine and your involvement with four individuals.

QUESTION: Well, why -- why should subjective intent make any difference here? I mean, the -- the effect on the -- on the accused is exactly the same.

MR. WAXMAN: Your Honor, I'm -- I'm simply reciting back for -- for you the court's instructions, and -- and saying that if the standard is deliberate elicitation and intentionally creating a situation, it essentially, in terms of providing a line, it proscribes what the police may not deliberately do, and --

QUESTION: Well --

MR. WAXMAN: -- but deliberateness, I think, is a finding of the magistrate, which -- to which the Eighth Circuit and this Court owe deference.

QUESTION: But deliberateness may refer to nothing more than intending the statement that was made, and whether it elicits or not, or whether it constitutes elicitation -- what a terrible word -- whether it constitutes elicitation, it seems to me, can be judged objectively, can't it?

MR. WAXMAN: Your Honor, perhaps, but

designed to elicit, it strikes me as including a subjective component. But even if I'm wrong, I submit that the magistrate was correct as an a priori matter in saying, look, these people -- these officers -- these agents of the prosecution, came to this man's house. They not only knew he had been indicted, Officer Bliemeyer had been the witness --

QUESTION: Bliemeister, I think.

MR. WAXMAN: Bliemeister -- had been the witness before the grand jury, and he comes --

QUESTION: Mr. -- Mr. Waxman, I -- I will assume that that is correct. I mean, I -- the record looks to me just as you're describing it. But assuming that, do you think there is any practical difference between what Deputy Bliemeister did here and what the officer did in Elstad?

MR. WAXMAN: I don't remember what the officer did in Elstad.

QUESTION: Well, in -- in Elstad, the -- there were two officers, one went with the mother of the suspect into the kitchen to tell her why they were there. The other one -- excuse me -- stayed in another room with the -- with the boy who was the suspect and started telling them what they were there to -- to investigate, there was a burglary next door.

And at the end of the conversation that's quoted in the opinion he said, you know, I -- I think you may know something about that, and they boy said, yes he did. And it seems to me that the elicitation there was functionally about the same as the elicitation here.

MR. WAXMAN: Well, that --

QUESTION: But I want to know whether you agree.

MR. WAXMAN: I -- I actually don't agree. I think -- I think for other reasons, that is, the -- the fact that this is a Sixth Amendment it doesn't matter. But I do think --

QUESTION: Well --

MR. WAXMAN: -- when the police officers come and say, we are here to discuss with you the following things, which happened to be the precise things that he has just been indicted for, that is a paradigm -- paradigmatic deliberate elicitation.

QUESTION: Well, yeah, but --

MR. WAXMAN: And --

QUESTION: -- to -- to say to a kid, you know, I think you may know something about this, and the person making that statement's a cop, sounds like elicitation to me.

MR. WAXMAN: Well, if -- if -- Mr. --

QUESTION: Functionally -- if -- if functionally it is, let's assume -- I -- I tend to think it is -- and -- and functionally in each case, whether it's Fifth Amendment right or Sixth Amendment right, the statement doesn't come in unless there is, among other things, a voluntary waiver of the right to the presence of counsel then and there. And in -- in each case we didn't have it. It's hard for me to see why in functional terms it should make a difference whether we're talking about Sixth or Fifth and why there should be a difference between this case and Elstad.

MR. WAXMAN: Because the functional analysis depends on the right being protected. The Fifth Amendment right does not embed a policy against deliberate elicitation of information from suspects. In fact, our system embraces that. And if there was a violation in Elstad, it was --

QUESTION: Well, neither does the Sixth. The -- what the Sixth says is, before you try anything like that, you've either got to have his counsel present or his counsel permission or his waiver of it. What's the difference?

MR. WAXMAN: It -- the difference is

what's being protected. What's being protected in the Fifth is coercion. What's being protected in the Sixth in this instance is precisely what --

QUESTION: Well, Mr. Waxman, isn't it also true that in one case there was an indictment, in the other there wasn't?

MR. WAXMAN: Well, yes. And what the Sixth Amendment protects in terms, Justice Souter, is that in all criminal prosecutions, the accused shall enjoy the right to the assistance of counsel.

QUESTION: And -- and recognize he's got that right because there was the indictment. And in the Fifth Amendment case, the Miranda case, we recognized that he's got that right, because this Court has said that's the only way you're going to make the Fifth Amendment work. So we start with the assumption that he's got the right, and that in fact the elicitation or statements that produce his statement are -- are -- are improper. His statement is inadmissible unless there's a waiver of the right to the presence of counsel at that time.

MR. WAXMAN: Absolutely. And that gets us right to Elstad, and the line that this Court drew in Elstad at the very outset of its opinion, which is that the consequences of an interrogation in

violation of Miranda differ importantly from the consequences of a violation of the Constitution itself, that is, primary illegality that goes directly, without prophylaxis, to what the Constitution proscribes. And this Court said over and over and over again in Elstad that we will not apply a derivative evidence rule where the violation is only the former, but we will apply it in the latter.

And that is the key distinction in this case. The distinction is not that the statements that they elicited from Mr. Fellers at his home didn't also violate Miranda, if he was in custody and the court found that he was, they did.

QUESTION: But most of our Miranda cases, we recognize that the -- the police nationwide understand the dynamics of Miranda. I have no empirical basis, and apparently you don't know either. My assumption is most police officers would be very surprised if there's a difference between Fifth and Sixth --

MR. WAXMAN: But --

QUESTION: -- their Fifth and Sixth Amendment obligations in -- in this -- in these circumstances.

MR. WAXMAN: But Justice Kennedy, I submit to you that it doesn't matter as a matter of constitutional prophylaxis. It may very well -- what the police officers know is, they knew they had to give him his Miranda warnings there. That we can be sure of. And they also knew that there would be consequences for not doing it, and this is not just the police. If it -- if it please the Court, this is the prosecution. Once there is an indictment, the police are not acting on their own. The police are part of the government prosecution, and if police don't know that, and are trying to game the system the way we heard it yesterday, it's the burden of the prosecution -- the prosecution and the Government to make sure that they do understand that.

What we're talking about here is the preservation of -- as this Court has said it -- equality -- equality of each side once the Government unilaterally define -- changes its posture with respect to someone so that that person is accused, and when it does that, it has to make -- it has to take steps to avoid interfering with the ability of the defendant at all critical stages and all confrontations to proceed based on ignorance or misapprehension of his rights or the legal

consequences.

I realize this sounds like --

QUESTION: Mr. Waxman, can I -- Mr. Waxman, can I just clarify that we do have the threshold question in this case, right? Because as it stands in the Eighth Circuit, you don't even have a foot in the door because there was no interrogation, it was only -- so we have to overturn the Eighth Circuit on that point before we get to what you're now talking about.

MR. WAXMAN: Yes, Your Honor. Now, the -- the Eighth Circuit was incorrect, because it applied the wrong standard. It asked whether there was interrogation, when this Court made clear in Rhode Island v. Innis that that is not the test under the Sixth Amendment for good reasons, and in any event, this was the, quote, functional equivalent of interrogation. I mean --

QUESTION: Well, because of the Eighth Circuit's position on the original statements, it really didn't address the subsequent jailhouse statements in any proper fashion, did it?

MR. WAXMAN: No. It -- it said -- what the Eighth Circuit said is, look, we don't think that there was a primary illegality, and therefore, we

don't have to discuss --

QUESTION: Right.

MR. WAXMAN: -- what the fruits consequences are.

QUESTION: So I suppose -- if we were to agree with you on the first statement and conclude they were deliberately elicited, we'd have to remand, I suppose --

MR. WAXMAN: I don't think so, Your Honor.

QUESTION: -- on the second question.

MR. WAXMAN: Because the question presented in the petition, the second question presented in the petition is, okay, assuming that there was a violation of the Sixth Amendment in the first interrogation, does the invocation, the mere invocation of Miranda warnings, cleanse that taint?

QUESTION: No, it wasn't that --

QUESTION: Well, except the Eighth Circuit didn't address that second question.

QUESTION: Right.

MR. WAXMAN: That's correct.

QUESTION: Well, would you like to say something about it --

MR. WAXMAN: I would.

QUESTION: -- because I -- in looking at

it, I want -- would like you to address the particular argument. First, the questioning at the house was about whether he'd ever participated in taking drugs with these people. The relevant question was whether he distributed drugs at the station. They did ask him if he wanted a lawyer. He did consciously waive it. And therefore, in fact, since this case is about a right to a lawyer, maybe if he'd had a lawyer it would have made a difference, but it's hard to see how the decision not to have the lawyer flowed from the first.

MR. WAXMAN: Well --

QUESTION: So they're different subject matters. Time passes and it's pretty attenuated to say that that first violation led him to the second. All right. Those are the arguments, et cetera.

MR. WAXMAN: Okay.

QUESTION: What do you say?

MR. WAXMAN: I'll -- I'll answer Justice O'Connor's question first and then your question. Justice O'Connor, the -- the -- the point here is that this Court has uniformly held that where there is conduct that constitutes primary illegality in violation of the Fourth, Fifth, or Sixth Amendments, not just a prophylactic rule, but the constitutional

requirement itself, the remedy is, you apply the derivative evidence rule, which puts the burden on the Government to prove that the taint has sufficiently attenuated.

QUESTION: But certainly the -- the -- the defendant can waive his right to counsel later on, and he did.

MR. WAXMAN: He absolutely can. And our case doesn't --

QUESTION: And he did.

MR. WAXMAN: He --

QUESTION: Do you think it's tainted simply because if we find a violation originally?

MR. WAXMAN: Our -- our case, Your Honor, doesn't depend on any argument or showing that the second statement was either involuntary or that the waiver of the right to counsel was not knowing and intelligent. Our submission is that the second statement is the fruit of the poisonous tree, just as if it were a piece of inanimate evidence. There's nothing wrong if somebody said -- with what the -- if police going and finding the body in the Nix case, the Christian burial case, but it's tainted because they got the -- that information derived from a violation of the Sixth Amendment. I had not up here

--

QUESTION: But he can certainly waive his Sixth Amendment right later. I just don't understand why what you say necessarily follows. We've never held that squarely, have we?

MR. WAXMAN: Well, you -- you have never held in a Sixth Amendment --

QUESTION: No.

MR. WAXMAN: You've never held the -- the precise question that's presented here for sure. But you have held that where there is conduct that violates the Sixth Amendment, this is Nix and Wade, the fruits of that conduct, regardless of what happens thereafter, are excludable as fruit of the poisonous tree, unless the Government shoulders its taint-attenuation burden.

And you have also held in a variety of cases that, starting with Wong Sun, that where the fruit is testimonial evidence, it too has to be excluded with the understanding that the administer -- the intervening administration of Miranda warnings are potent evidence, but they are not sufficient in and of themselves to establish taint attenuation. You said it in Brown. You said it last term in Kaupp v. Texas. You've said it in Dunaway and any number

of other cases.

QUESTION: How is the second statement the fruit of the first?

MR. WAXMAN: The first statement in the first -- I mean, as a -- that -- this is a sort of a common sense, practical analysis, but in the first statement he was -- he acknowledged that he had used methamphetamines and he had associated with the four individuals that the police officer named. And you, Justice Breyer, the indictment was conspiracy to possess methamphetamines with intent to distribute and to distribute. He made very inculpatory statements.

Thirty minutes later, he executes a Miranda warning -- waiver -- in the station house, and he is asked, okay, tell us more about this possession and tell us person by person about your association with those four people. They then go on and ask more questions about other people, but in this case, the link between the two is as direct as one can possibly imagine. I mean, this Court has established a -- has long recognized a presumption that where the -- when the Government acquires evidence in violation of the Constitution, any substantially similar evidence obtained by the police

subsequent to that derives from it unless the Government can prove it doesn't. That was waived.

QUESTION: I can under -- I can understand the position, although I'm not entirely persuaded by it, that where -- when you are violate -- have violated the Fifth Amendment and gotten a confession that's already on the table, the second confession is sort of the fruit of that, because the person thinks, what the heck, I've already confessed, I may as well -- that's the argument that it's the fruit.

MR. WAXMAN: The taint --

QUESTION: But I don't -- but I don't see how the waiver of -- of counsel the second time is the -- is the fruit of the improper approach the first time. I mean, I -- I don't see somebody saying, what the heck, I waived counsel the first time, I may as well waive it the second.

MR. WAXMAN: Your Honor, the taint --

QUESTION: That doesn't follow the way -- the way confession does.

MR. WAXMAN: The taint, which this Court in Elstad, in part IIa of its opinion in Elstad, said was insufficient -- IIb -- was insufficient to prove involuntariness, is in fact what demonstrates that there is fruit of the poisonous tree here in the

link, and that is the accepted, common sense proposition that an uncounseled accused, from whom the Government deliberately elicits an unwarned, incriminatory statement after it institutes adversarial proceedings, is erroneously likely to believe that there is little to be gained and much to be lost from attempting to avoid further incrimination.

QUESTION: Well, now, but is there -- is there some authority for that specific proposition that you just said?

MR. WAXMAN: This Court recognized it in Bayer, in Brown, in --

QUESTION: Did it say -- I -- I'm -- you -- you just recited kind of a litany. Did the Court recite that sort of a litany in Bayer?

MR. WAXMAN: Well, in Brown, for example, it said that the second warrant statement, quote, was clearly the result and fruit of the first. The fact that Brown had made one statement believed by him to be admissible bolstered the pressures for him to give the second, or at least vitiated any incentive on his part to avoid self-incrimination.

QUESTION: But that -- that's a -- that's a first statement. That's -- you're -- you're

talking here about a waiver of counsel and you're saying that's the same thing.

MR. WAXMAN: It is the same thing. In that case they were talking about the second statement, which was preceded by a waiver of counsel, and making not the, Your Honor, not the legal judgment that the second statement was there for coerced or involuntary, but the practical -- what this Court has described as the psychological and practical disadvantage of having confessed a first time can be regarded as a fruit of the first.

QUESTION: Yeah, but isn't the -- the -- isn't the -- correct me if I'm wrong. I think your theory is that the waiver itself is likely to be a fruit because a person is going to say, I've already let the cat out of the bag, what do I need a lawyer for. Is -- is --

MR. WAXMAN: Yes. That's -- as --

QUESTION: -- that your position?

MR. WAXMAN: -- as -- as Justice Harlan stated in his concurrence in Darwin, which is only a concurrence, but I think is sort of the --

QUESTION: Well, but that -- that's -- the cat out of the bag is what we rejected in Elstad.

MR. WAXMAN: You rejected it, Your Honor,

as evidence or as constituting or -- or eliciting a presumption of involuntariness. But you did it only after -- in part IIa of your opinion in Elstad, you said, derivative evidence rule doesn't apply. Fruits are not going to be excluded from Elstad -- from a Miranda violation. Now, the Court said in part IIb, now we have to deal with the contention that he says it's involuntary, and his only evidence that it's involuntary is that it was the cat out of the bag and there was this psychological compulsion.

That's too attenuated and hypothetical to constitute a presumption of compulsion, but it is precisely what this Court has recognized in Brown and Dunaway and Bayer and Taylor and Harrison as being a psychological fact --

QUESTION: And that should make the case -- that case that we heard yesterday easier than this one if that's the standard, because there, the first unwarned set of questions was much more intense, much more detailed than in this case.

MR. WAXMAN: Right. And the -- the only burden in the -- in the case yesterday that I don't have is that the primary illegality was a violation of Miranda, and not of the Fifth Amendment prohibition against coerced confessions itself.

Thank you.

QUESTION: Thank you, Mr. Waxman.

Mr. Dreeben, we'll hear from you.

ORAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE RESPONDENT

MR. DREEBEN: Mr. Chief Justice, and may it please the Court:

On the central legal issue in this case, the critical fact is that, at the jailhouse, after petitioner was transported from his home, petitioner received a full set of Miranda warnings, which apprised him of his right to counsel, and knowingly, voluntarily, and intelligently waived his right to counsel.

QUESTION: Did the Eighth Circuit ever decide whether there was a knowing and voluntary waiver at the jailhouse?

MR. DREEBEN: Yes. I believe that the Eighth Circuit did, Justice O'Connor, because the Eighth Circuit applied Oregon v. Elstad to reject what appears to be a Miranda-style argument that petitioner made in addition to his Sixth Amendment argument.

QUESTION: I thought that perhaps since they didn't think the first statement posed a problem

that they never really got to the crux of the jailhouse inquiry.

MR. DREEBEN: Well, I -- I think in -- in part, Justice O'Connor, your reading of the opinion is correct. The court did say that under Patterson, the Sixth Amendment argument that petitioner is making in this Court doesn't get out of the starting gate, because there was no interrogation, it used the word interrogation. There was an issue about whether interrogation is equivalent to deliberate elicitation, and I'll try to address that.

But before the court got to the Sixth Amendment question, it addressed on pages 121 and 122 of the joint appendix the argument based on Elstad, and the argument that the petitioner made was that the statements made at the jailhouse should be suppressed -- and this is on page 121 of the joint appendix -- because the primary taint of the improperly elicited statements made at his home was not removed by the recitation of his Miranda rights at the jail.

And then the court went on to discuss Oregon v. Elstad in detail and rejected that holding, that argument. And the way that I interpret that passage is that the court affirmed the district

court's explicit finding of a knowing, voluntary, and intelligent waiver, and applied Elstad to reject that claim.

QUESTION: Just so I understand what the Sixth Amendment rule is, if the Sixth Amendment prohibits the state from eliciting statements when the defend -- when proceedings have begun, outside presence of counsel, is it wrong for them to give the Miranda warning and if he's then silent, then go ahead and say, now you've had your Miranda warning, would you like to talk to us? Is that consistent with the Sixth Amendment rules that we impose? That is to say, can you elicit the statement after you've given the waiver, consistently with the Sixth Amendment right?

MR. DREEBEN: Yes. Patterson v. Illinois specifically addressed the question of what does it take for officers to obtain a waiver of counsel. The only point where I would disagree, Justice Kennedy, with your summary is that presence of counsel is not required. The defendant has the right to choose whether to have or to waive counsel.

And in Patterson, the Court held that the Miranda warnings conveyed to a suspect who has been indicted all of the information needed to make a

knowing and a voluntary and intelligent waiver of counsel in custodial interrogation. That's what petitioner got.

QUESTION: And they can attempt to elicit that waiver consistently with the Sixth Amendment?

MR. DREEBEN: That's correct. They can approach the defendant, apprise him of his rights, and if the defendant then makes a knowing and intelligent waiver of his rights --

QUESTION: No, that wasn't my question. Can they -- can they advise him of those rights, he's silent, and then try to elicit the statement? Say, now we've apprised you of your rights and we want you to talk to us. Is that consistent with the Sixth Amendment?

MR. DREEBEN: I think so, if that's construed as seeking a waiver of his right to counsel. Of course, there has to be a finding that there was in fact a waiver of the right to counsel. The police officers can't simply read Miranda warnings, provide no interruption whatsoever to make sure that the defendant actually understood them, and then barge right ahead.

Now, there are cases where the courts have to decide whether there was an implicit waiver of

counsel under those circumstances, but this isn't a case like that, because the Miranda waiver form in the record clearly indicates --

QUESTION: But, Mr. Dreeben, maybe I'm wrong on the facts, but you're relying on the waiver at the station house?

MR. DREEBEN: That's correct.

QUESTION: Do you agree that prior to that waiver there had already been a violation of the Sixth Amendment?

MR. DREEBEN: No, Justice Stevens. Our --

QUESTION: Well, then -- then you don't need the waiver.

MR. DREEBEN: That -- that is true. I -- my submission is on the critical legal question. Even if the Court finds against us on what I would acknowledge is a close question about whether the interaction at the home constituted deliberate elicitation under the Sixth Amendment --

QUESTION: Assume it was deliberate elicitation. Would you say it was a violation then?

MR. DREEBEN: No, I wouldn't say that it was a -- an actual violation of the Sixth Amendment at the time. The Sixth Amendment is a trial right. The right to counsel has to be evaluated by reference

--

QUESTION: So even if there was no waiver at the home, there -- there still was no violation of the Constitution?

MR. DREEBEN: Not at that time. I -- I want to make it perfectly clear, Justice Stevens --

QUESTION: It seems to me a rather extreme position.

MR. DREEBEN: Well, I -- I don't think it is extreme, because I'm going to follow it up with what I think Your Honor is getting to, which is, can the police simply go to an indicted suspect's home, ignore his right to counsel, and engage in questioning? And the answer is, generally no, sometimes yes. The generally no is that once the defendant has been indicted, the right to counsel provides a -- or a direction to the police not to interfere with or circumvent the right to counsel.

QUESTION: Well, what is the sometimes yes?

MR. DREEBEN: Sometimes yes is that, this Court has recognized in its seminal case in this area, the Massiah case, and then again in Maine v. Moulton, that the Sixth Amendment, as it is offense-specific, does not preclude the police from

investigating ongoing criminal activity that's not charged.

QUESTION: Well, but this is -- this was an offense-specific interrogation if it -- if was an interrogation.

MR. DREEBEN: Yes. I -- and this case doesn't involve the --

QUESTION: It seems to me there's an analogy to civil cases here. Supposing you just had a civil lawsuit pending against the person and after it's filed, wouldn't there be an ethical obligation on -- on behalf of the plaintiff not to send agents out to question your adversary in the proceeding?

MR. DREEBEN: There may be a ethical obligation, even if the party is not known to be represented at the time, although --

QUESTION: If he's known not to be represented, that's my case.

MR. DREEBEN: He's known not be represented, I think it's a closer question whether -- whether the ethics rules would -- would bar the approaching of the defendant. But this Court has made --

QUESTION: Who -- who -- who would you go to? If he hasn't appointed counsel and --

MR. DREEBEN: Well, Justice Stevens --

QUESTION: -- and he's filed the case -- he's filed the case pro se. Who would you approach if you don't approach him?

MR. DREEBEN: I think, Justice Stevens --

QUESTION: Now, I'm assuming that the -- the Government is the plaintiff in the case. That --

MR. DREEBEN: The implication is that you couldn't approach him. And this Court has clearly made it evident that whatever the ethical rules might be with respect to private conduct, the Sixth Amendment rules are not governed by them. And the Sixth Amendment rule, in this area at least, is relatively clear. The police can approach an unrepresented defendant, advise him of his rights, and obtain a waiver of the right to counsel.

QUESTION: Well, can the police approach a person and deliberately elicit statements without advising him of his right to counsel after indictment?

MR. DREEBEN: Not on the charged offense, Justice O'Connor, and have the information admitted at trial. The -- the threshold question --

QUESTION: Well, have we looked to whether the statement was deliberately elicited? Has that

been our understanding of what we'd look to?

MR. DREEBEN: That -- that has been the way that this Court has formulated the test, and I would suggest that if --

QUESTION: And so should we apply that test here to those early statements?

MR. DREEBEN: Yes, but I think the Court should clearly reformulate it to make it in the context of overt interrogation by the police, known police officers, to be an objective test. The deliberate elicitation standard, as so phrased, gives rise to some confusion, because it does suggest that there's a subjective component to it, where deliberate elicitation does have a different application than interrogation for purposes of Miranda with respect to undercover agents. The Court has made clear that once a suspect is indicted, the police cannot use an undercover agent, not known or identified as such to the defendant, to circumvent his right to counsel. And in that respect, deliberate elicitation is broader.

But in footnote 12 of Maine v. Moulton where the Court was discussing deliberate elicitation in some detail, the Court made clear that intent is hard to prove, and it's really not the main issue

here anyway. What we should be interested in is whether the Government must have known that its conduct would be likely to elicit incriminating statements, and that is essentially the same as the Rhode Island v. Innis standard for interrogation. In fact, it's a little bit more onerous for the defendant, because it says, must have known, and the Rhode Island v. Innis standard is should have known.

In any event, the Government submits that the Court should make it clearer that when you're dealing with identified police officers interacting with suspects post-indictment, the Rhode Island v. Innis standard, the objective test should be the definition of deliberate elicitation. Then the question becomes, was there deliberate elicitation on the record in this case?

What happened is, the officers arrived at petitioner's home. The officers knew petitioner. This was not somebody that they had never met before. They'd met him on prior occasions. And they said in one continuous statement, we're here to discuss your methamphetamine activities, we have a warrant for your arrest --

QUESTION: Didn't they say, we're here to discuss with you?

MR. DREEBEN: Justice --

QUESTION: Wasn't it Bliemeister's statement, I'm here to discuss with you?

MR. DREEBEN: Justice Souter, on three occasions when Officer Bliemeister was asked to say what he said in his own words, he said, we're here to discuss your methamphetamine activities. On one occasion, when defense counsel in cross-examination reformulated what Officer Bliemeister said, and said, didn't you say you're here to discuss with petitioner his methamphetamine activities, Officer Bliemeister answered yes. Both the magistrate judge and the district court did not use the with you language in describing what the officer said.

And to the extent that this case turns on a rather subtle distinction in language, I think the distinction is relevant, because what the officers were essentially doing is introducing the topic of what they were going to tell petitioner, namely, your methamphetamine activities have landed you in trouble, we're here to arrest you, we have an indictment for your arrest. And then petitioner began to speak primarily --

QUESTION: Telling -- telling is not discussing. I mean, I don't see why the phrase, with

you, is essential when the only person in the room is -- is -- is you --

(Laughter.)

QUESTION: -- and somebody comes in and says, I'm here to discuss, you know, whatever. Who else are you going to discuss it with then?

(Laughter.)

MR. DREEBEN: I don't think there was any ambiguity about the object of the statements, but the question of what the officers were intending to do is somewhat informed by the way they phrased it.

QUESTION: No, but the -- the usual sense of the word discuss is something that involves other than -- something involving more than a monologue. So I mean, I -- as Justice Scalia said, I -- it might make it clearer if he had said with you each time, but without the with you, discuss implies give and take.

QUESTION: At -- at least if there's nobody else in the room. I mean, if there's a crowd of people and you say, I'm here to discuss something, maybe you're going to discuss it with the other people. That's fine, but -- but it -- this was one-one-one.

MR. DREEBEN: I readily acknowledge that

this is a case that could be reasonably decided more than one way, but I would submit that if you look at what the officers did, the officers in the -- at his home, basically informed him about the fact that he was under arrest and indicted. He spoke uninterrupted except by one completely irrelevant question to the topic of the indictment, until the officers interrupted him, cut him off, and said it's time to go, John, you know. And John said, can I please get some shoes on? And they accompanied him downstairs, he got shoes, then they took him down to the jailhouse. No questions about the topics that were later discussed at the jailhouse.

QUESTION: Well, if we were to conclude that there was a violation of the so-called deliberate elicitation standard, modified or not, then what, with regard to the subsequent conversation of the jail, after the warnings had been given?

MR. DREEBEN: Then I think, Justice O'Connor, that this Court should apply its rule in Oregon v. Elstad that the knowing, voluntary, and intelligent waiver of the right to counsel constitutes an independent act of free will that breaks any causal link that might otherwise have been posited between the statements that were made in the

initial unwarned session --

QUESTION: And you think that that determination has been made knowing and voluntariness as to the jailhouse statement --

MR. DREEBEN: I --

QUESTION: -- by the court below.

MR. DREEBEN: Not only do I think that it was made explicitly in the district court and implicitly in the court of appeals, but I don't believe that petitioner contests it. I don't believe that petitioner's position is that the waiver of rights was actually tainted. What I understand petitioner's position to be is that there was a violation of a primary constitutional norm at home when -- when petitioner was interrogated or statements were deliberately elicited. Accordingly --

QUESTION: The fruits --

MR. DREEBEN: Exactly. The same fruits rule ought to apply that applies under the Fourth Amendment and then petitioner relies on Fourth Amendment precedents, which the Government does not think are -- are applicable here.

QUESTION: I - I think -- I think he would say it is a fruit because it is not totally

voluntary, given the fact that he had already let the cat out of the bag. I -- I -- I don't think -- I don't think he would acknowledge that the second waiver -- that the waiver of counsel in the second interrogation was entirely free, given what had preceded.

MR. DREEBEN: Well, Justice Scalia, I'll have to let petitioner's briefs speak for what --

QUESTION: Well, we -- we've destroyed his right of rebuttal, so --

(Laughter.)

QUESTION: And that's the question basically, because I think that's an important question and -- and the question is whether there is a right to a lawyer, and when the Government violates the right to the lawyer, like the Fourth Amendment or any other amendment, they can't use a fruit. Now, Oregon v. Elstad is talking about a right that isn't complete until you fail to introduce the -- until you use it as testimony at trial, and therefore Oregon v. Elstad is a different, and considerably more lenient test. I confess I always would have thought until this moment that our Court cases said you apply the fruits because the violation is complete.

Now, it seems to me in advocating the

second, you're advocating a considerable change, but whether it's a change or not a change, I want to know the reason for it.

MR. DREEBEN: There are two critical reasons, Justice Breyer, why Oregon v. Elstad should apply in this context. The first is that the right that the defendant did not get, by hypothesis now, at home, was the right to make an informed waiver of the right to counsel. When the defendant got the Miranda warnings at home, that fully cured any deficiency in knowledge that the defendant previously had about his right to counsel, and enabled him to make an act of free will that broke any causal link between the first statements and the second statements.

And the second crucial reason why Elstad should apply here is Elstad is not simply limited to reasoning that is only applicable in the context of compulsion under the Fifth Amendment. It also clearly and explicitly said, it's very speculative and attenuated to posit that a defendant who spoke at one time is therefore going to believe that the cat is out of the bag and I should speak again, I don't really have a choice.

QUESTION: Right. But as to the first, my Constitution says you have a right to a lawyer, not

-- of course you can waive it, like anybody -- other right. But that's quite different than the Fifth Amendment right, which is a right not to testify against yourself, which is in complete to a trial.

As to the second, of course, attenuation is relevant. It's relevant under the tree -- fruits doctrine. It's relevant under Elstad. So if you prove attenuation, fine. So, given those two things, why do we have to change the law here? Or is it a change?

MR. DREEBEN: Well, I don't think it's a change, Justice Breyer, because the Court has never addressed the specific dynamic involved in this case under the Sixth Amendment of a defendant who makes an unwarned statement --

QUESTION: Well, the Nix v. Williams case bears on it to some extent, doesn't it?

MR. DREEBEN: It does --

QUESTION: That was a Sixth Amendment case.

MR. DREEBEN: Yes, Justice O'Connor, and I -- I accept, although I think it's fair to say that Nix did no more than assume that there would be a fruits rule as to physical evidence.

QUESTION: Yeah. And the Court in Nix

made it pretty clear that we assumed there would be a fruits suppression.

MR. DREEBEN: Correct. As to physical evidence.

QUESTION: But applied some other reason to let the body --

MR. DREEBEN: Well, the Court -- the Court there relied on inevitable discovery.

QUESTION: Right.

MR. DREEBEN: Here, our basic position is that the voluntary testimony of the defendant himself is different from physical fruits or from the situation involving a tainted line-up, which was involved in Wade, and that the decision, made voluntarily and intelligently by a defendant to waive counsel, is a per se break in any causal chain that would be positive.

And our second argument is that the Court has already rejected in Elstad the idea that there is a causal link between a defendant's letting a cat out of the bag in the first statement and then being confronted with the question whether to waive his rights in the second.

QUESTION: Mr. Dreeben, do -- do I understand correctly that essentially you are saying

that Mr. Waxman in wrong in bracketing the Sixth Amendment with the Fourth Amendment, that it belongs with the Fifth Amendment? And one, it seems to me, large difference between the two of you is Mr. Waxman describes the Sixth Amendment violation of -- as occurring on the spot. You have said in your brief it's just like the Fifth Amendment. It's sort of inchoate until the Government seeks to introduce it at a trial. Is that still your view, so that the -- the right to counsel isn't complete -- the violation isn't complete until the Government makes an effort to introduce it at trial?

MR. DREEBEN: It is. My view that the violation is not complete until the evidence is introduced at trial, but I think where I put the Sixth Amendment is not numerically accurate, but it's somewhere in between the Fourth and the Fifth Amendment rules, in that there are circumstances in which I believe that there is a fruits rule attached to conduct that infringes a Sixth Amendment norm. The right itself may not be a completed violation until evidence that results from infringing a Sixth Amendment norm is actually used against the defendant. Adversarial fairness is the goal of the Sixth Amendment. If it is not infringed, neither is

the Constitution.

QUESTION: Because if -- if the -- we describe that right, that Sixth Amendment amendment right as a right to counsel at every critical stage in the criminal proceeding, then that sounds like there's a critical stage and you haven't been told and haven't waived your right to a lawyer, the violation is complete.

MR. DREEBEN: No, I don't think so, Justice Ginsburg. And one example that I think makes the point very clear is this Court's ineffective assistance of counsel cases. Those cases require not only that a lawyer performs deficiently, below any reasonable professional standard, but also that there be an effect on the fairness of the trail in the form of prejudice. It's a two-part standard. There is no constitutional violation merely by interfering with the right to counsel. Another case that makes that point --

QUESTION: Well, there's a constitutional deficiency. I mean, we're playing with words. What we're saying in the counsel cases is, if we have to go back and unring the bell, we want something more than simply the deficiency. We want to know that requiring a new trial or whatever is likely to make a

difference.

The question here is -- is asked, I think, Justice Ginsburg's question is asked on a prospective basis. And that is, at the time the -- the police question without counsel, is that a violation of the -- of the Sixth Amendment?

MR. DREEBEN: And my --

QUESTION: Your -- your answer a moment ago was, the only violation of the Sixth Amendment was the denial of the -- of the opportunity to waive. But he's got to have an opportunity to waive something, and I suppose that implies that he has, at least on a prospective basis, a right to the presence of counsel there if the police are going to question him, absent a -- a waiver.

MR. DREEBEN: I -- I think that there's a lot in your question, Justice Souter, but I -- I think I basically agree with the thrust of it. He does have the right to choose whether to have counsel or not after he's been indicted when the police approach him for interrogation. The question in this case is, what do you do if that didn't happen? And --

QUESTION: Of course, the -- the other way to look at is upside down. I mean, if -- if you

concede that there's a Sixth Amendment violation immediately, you're still free to argue that -- that in -- in the Miranda case, there's also a Fifth Amendment violation immediately. Now, you couldn't do that with Elstad, but after Dickerson, you can certainly argue that.

MR. DREEBEN: Well, as we discussed yesterday, Justice Scalia --

QUESTION: Yes, I know.

MR. DREEBEN: I -- I believe that the violation in a Miranda case consists precisely of the admission of the defendant's statements in the Government case in chief. The Fifth Amendment is an evidentiary rule. That's what the nature of the violation is. It's not a conduct-based rule.

QUESTION: Well, and that has a textual support in the constitutional language itself.

MR. DREEBEN: That -- that's correct.

QUESTION: But you don't have quite the same thing on the Sixth Amendment?

MR. DREEBEN: No, but I don't think that it matters because we're conceding that the Court engages in fruits analysis. Our primary position in this case on the legal issue is that the defendant's independent, untainted decision to waive counsel is a

act of --

QUESTION: But Mr. Dreeben, it's -- the thought runs through my mind that if he were to waive counsel in front of a judge in a trial setting, the judge would ask him a lot of questions and be sure the waiver was intelligent and voluntary and so forth. And you're suggesting, at the time he's first indicted when the police approach him, he doesn't need any of that guidance as all. If he just answers the question, that's sufficient.

MR. DREEBEN: Well, that -- that is --

QUESTION: It's a rather dramatic difference in the kind of waiver of this very important right.

MR. DREEBEN: True. But that's what the Court held over Your Honor's dissent in Patterson v. Illinois. The Court explicitly considered the issue of what kind of a waiver is necessary, and the Court held that the issuance of Miranda warnings provides the defendant with all the information that he needs to know.

QUESTION: But, of course, you didn't even have the Miranda warning here --

MR. DREEBEN: No, but --

QUESTION: -- at the home.

MR. DREEBEN: And we're not claiming that there was a waiver of the right to counsel. Our -- our claim for whatever favor it may meet with the Court is that there was no deliberate elicitation of statements. We're not claiming a waiver at the home. We are unequivocally claiming a waiver at the jailhouse.

QUESTION: Don't you think it is a rather -- rather strange that the judges are as careful as they are in a trial setting, whereas the police can just do what they did here? Does that -- doesn't trouble you?

MR. DREEBEN: No, I don't think it's strange at all, because as the Court explained in Patterson, the question of a waiver is a functional question that turns on what the role of counsel might be at a particular setting. Now, the role of counsel at trial is considerably more complex in dealing with evidentiary matters and legal claims than the role in pre-trial interrogation.

QUESTION: Actually, in -- in a situation like this, the whole outcome of the proceeding is determined by what happened in his home.

MR. DREEBEN: Well, in this particular case, and this is my third and final point, if the

Court should determine that the waiver of rights is not a per se independent act that attenuates any taint, on any record the Court should not find that there is any taint that is unattenuated. The violation at home, if there was any, was an extremely mild violation. If the defendant let the cat out of the bag, it was really at most one paw, not an entire cat.

(Laughter.)

MR. DREEBEN: The -- the defendant barely spoke at all about his activities relating to the charges that were identified in the indictment. He said that he had business and personal problems and he was a methamphetamine user, and he rambled on for a while until the police cut him off. At the station house, he was asked specifically person by person what his relationship was with the individual and what the activities were, and of course, he gave more elaborate information at that time, but -- and this is critical too. It was not information that admitted the charges in the indictment. This wasn't a case where a defendant said, well, I've confessed once, I might as well confess again now that I have my Miranda warning. This was an individual who spoke about his problems at his home, then he gets down to

the station house and he's essentially talking about all the things that make him not liable, criminally liable under the indictment.

It was an instance in which, I would submit, the motive for the defendant to talk was not that the cat was out of the bag, but that he was hoping to minimize any suggestion of guilt and persuade the officers that the indictment was not properly founded.

And finally, of course, the officers never exploited any prior statement and they did give him a thorough, complete administration of Miranda warnings, and under the circumstances of this case, even if the Court were to apply a taint analysis sometimes, or to assume that a taint analysis applies, the facts of this case demonstrate enough attenuation so that the jailhouse statements should be admitted, while the statements at home were suppressed.

QUESTION: Are -- are you arguing that the fruits rule does not apply, or are you arguing that this is not the fruits?

MR. DREEBEN: I am arguing that a fruits rule applies under the Sixth Amendment. I'm conceding that by virtue of the Court's assumption in

Nix v. Williams and its holding in United States v. Wade. But the case of a defendant's own voluntary statements should be treated as a special case under a fruits rule in which there is per se attenuation in the form of an independent act of free will that intervenes between the violation and the ensuing waiver. And that comes about when the defendant receives full and complete information about his rights. There is no suggestion of involuntariness in his waiver and he decides to speak.

The ultimate test in attenuation law is was there an independent act of free will when you're speaking of a confession that breaks the causal link to the prior illegality. Here, we submit as a matter of law under Oregon v. Elstad's reasoning, there was.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Dreeben. The case is submitted.

(Whereupon, at 11:07 a.m., the case in the above-entitled matter was submitted.)